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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF PIERCE

9 WASHINGTON STATE REPUBLICAN  
10 PARTY, an unincorporated association, et al.,

11 Plaintiffs,

12 v.

13 KING COUNTY, et al.

14 Defendants.  
15

No.

MOTION FOR TEMPORARY  
RESTRAINING ORDER

16 I. RELIEF REQUESTED

17 Plaintiffs the Washington Republican Party and Electors Christopher Vance and  
18 Jane Milhans move for a temporary restraining order under CR 65 enjoining King County  
19 from recanvassing and counting 573 previously canvassed and rejected absentee ballots  
20 and preventing them from taking any actions that would place these ballots into a position  
21 where they could not be individually removed if it is later determined that some or all of  
22 the ballots are invalid or illegal and should not have been counted.

23 II. STATEMENT OF FACTS

24 A. Introduction.

25 On November 17, 2004, Secretary of State Sam Reed announced the official results  
26 of the November 2, 2004, general election. Dino Rossi won the Governor's race by a  
27 margin of 261 votes. See [http://www.secstate.wa.gov/office/news\\_releases.aspx](http://www.secstate.wa.gov/office/news_releases.aspx). Because

1 the margin of victory was fewer than 2000 votes, the Secretary of State ordered a machine  
2 recount of the votes in the race for governor. *See* RCW 29A.64.021. When the votes were  
3 re-tabulated, Dino Rossi again prevailed and, pursuant to RCW 29A.60.250, the Secretary  
4 of State certified the results and confirmed on November 30, 2004, that Rossi is the  
5 Governor-Elect.

6 After the machine recount was complete, the Washington Democratic Central  
7 Committee ("Democrats") sought a manual recount under RCW 29A.04.139. Shortly  
8 thereafter, the Democrats filed a petition with the Washington Supreme Court in which  
9 they sought, among other things, a ruling that the manual recount should include a  
10 recanvass of ballots that had been previously rejected by canvassing boards. In particular,  
11 the Democrats asked for an order that would require canvassing boards to revisit decisions  
12 that had been previously made as to whether signatures on absentee and provisional ballots  
13 matched original voter registration signatures already on file around the State. The  
14 Supreme Court denied the Democrats' request and specifically held that a recount does not  
15 include a broad recanvass. *See* Maguire Dec., Ex. 1 at p. 3, Opinion Order dated December  
16 14, 2004.

17 **B. King County has decided to Recanvass 537 Previously Considered and**  
18 **Rejected Absentee Ballots.**

19 As part of the process of canvassing absentee ballots prior to November 17, 2004,  
20 election workers compared the signatures on an absentee ballot's security envelope with  
21 the existing original voter registration signature on file with King County. In King  
22 County, the signatures on the ballots were compared with digital images of the signatures  
23 on the original voter registration forms. *See* Declaration of Dan Brady ("Brady Dec."), ¶ 3.

24 On the afternoon of December 15, 2004, the King County Canvassing Board  
25 ("Canvassing Board") met and took up the issue of 573 absentee ballots that had been  
26 previously canvassed and rejected. According to King County, the particular 573 ballots at  
27 issue were considered and rejected prior to November 17, because King County could not

1 match the signatures on the absentee ballots with any digital voter registration signature.  
2 Nevertheless, at the December 15, 2004 meeting, the Canvassing Board voted 2 to 1 to  
3 recanvass the ballots so that they might be counted. The member of the Canvassing Board  
4 representing the King County Prosecutor objected to the Canvassing Board's decision but  
5 was outvoted. Brady Dec., ¶ 4.

6 Prior to the Canvassing Board's meeting, counsel for the plaintiffs sent the  
7 Canvassing Board a letter raising concerns about the discovery of the 573 absentee ballots.  
8 See Maguire Dec., Ex. 2. The letter asked the Canvassing Board to fully investigate the  
9 573 ballots before jumping to a decision as to how they should be treated. The letter also  
10 identified numerous specific factual questions that should be answered by the Canvassing  
11 Board to ensure the integrity of the election process. *Id.* The Canvassing Board has not  
12 responded.

13 Instead, at the December 15 meeting, the Canvassing Board heard from Bill  
14 Huennekens, the King County Superintendent of Elections and decided to recanvass the  
15 ballots.<sup>1</sup> Huennekens reported that the signatures on the absentee ballots had been checked  
16 twice – first by an election worker and then by a supervisor – against the digital signatures  
17 before they were rejected. Because the County was not able to find digital signatures for  
18 the 573 ballots, they were rejected as invalid. Brady Dec., ¶ 5.

19 Huennekens's report was confusing and unclear, but he appeared to say that in  
20 August, King County sent letters to more than a thousand registered voters for whom King  
21 County was missing digital signatures. In those letters, the individuals were given the  
22 opportunity to update their registration signatures. He appeared to report that among those  
23 who were sent letters in August were at least 101 of the 573 individuals whose absentee  
24 ballots are currently at issue. At another point during the meeting, Huennekens reported  
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26 <sup>1</sup> Plaintiffs have requested an expedited copy of the recording of the Canvassing Board  
27 meeting and expect to obtain the recording within the next two days. Plaintiffs intend to  
provide the Court with a copy of that recording as part of the record in this case.

1 that at least 423 of the 573 (and possibly all of the 573) were also sent an additional letter  
2 after King County received their absentee ballots and determined that there were still not  
3 digital signatures on file for those individuals. The letters provided the individuals with  
4 the opportunity to update their signatures to ensure that their ballots were counted.  
5 Huennekens reported that he did not know how many of the individuals responded to the  
6 letters. Brady Dec., ¶ 6.

7 According to media reports, over the course of last weekend King County Council  
8 Chair Phillips learned that his name was among the 573 whose ballots had been rejected  
9 because King County could not find a digital signature. Apparently as a result of Phillips'  
10 discovery, King County considered revisiting the previous decision to reject the 573  
11 ballots. King County now asserts that election workers made an error in the initial canvass  
12 of those ballots because, according to the County, when the workers could not find a  
13 digital signature, they should have looked for signatures in the original paper records and  
14 did not. Brady Dec., ¶ 7.

15 At the December 15 meeting, Huennekens said that the 573 rejected ballots have  
16 been kept secure in a vault since they were rejected in November. Dan Brady, the lead  
17 observer for the Washington State Republican Party for the King County portion of the  
18 statewide recounts and Kenneth Seal, another official observer, observed that this is not  
19 true. Brady Dec., ¶ 2, 8; Declaration of Kenneth Seal.

20 As a general matter, it appears that around the clock security by a Deputy was not  
21 provided until after the machine recount began in late November.

22 Furthermore, ballots that were rejected and not counted were *not* kept in the same  
23 manner as those ballots that were counted. Counted ballots were placed in sealed  
24 containers and kept in a fenced, locked area in the Mail Ballot Operation Satellite.  
25 Rejected ballots were not placed in sealed containers but were kept in open trays.  
26 Observers noted that the rejected ballots were not, at least on one occasion, kept in a  
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1 fenced, locked area. Instead, as Huennekens confirmed to Mr. Brady, the 573 ballots at  
2 issue were among a set of rejected ballots that had been removed from the fenced, locked  
3 area and kept overnight in an open area in open trays. Brady Dec., ¶ 8.

4 Mr. Seal relates additional, troubling facts regarding the 573 ballots. At the  
5 counting center, Mr. Seal saw a cart with mail trays containing ballots in envelopes that  
6 had been pulled out of the vault. He later learned that these were the 573 ballots at issue in  
7 this case. He saw Huennekens put the tray of ballots in the lobby where Huennekens  
8 began reviewing them. Huennekens appeared unusually agitated when Mr. Seal asked him  
9 what he was doing and refused to tell Mr. Seal anything other than that he was sorting  
10 ballots by category. Shortly thereafter, Mr. Seal was told that those ballots had been taken  
11 from the building to another building and that neither any observers nor deputies from the  
12 King County Sheriff's Office accompanied the ballots when they were transported. Mr.  
13 Seal notes that this was not the common practice. Declaration of Kenneth Seal.

14 At the December 15 Canvassing Board meeting, the member of the Canvassing  
15 Board representing the King County Prosecutor expressed his concern that he had received  
16 information regarding the 573 ballots only 30 minutes prior to the meeting. He indicated  
17 that there was an insufficient factual record before the Canvassing Board to make a  
18 decision as to how the 573 ballots should be handled. He encouraged the Canvassing  
19 Board to wait a day or two until a further investigation could be done regarding the facts  
20 surrounding these ballots. He noted that Huennekens was not yet able to answer all of his  
21 questions. He also made clear that because the hand recount in King County is expected to  
22 continue for at least another week, the County had the time to conduct an investigation  
23 without delaying the completion of the recount. Brady Dec., ¶ 9.

24 Notwithstanding those statements, and the Supreme Court Order this week  
25 expressly limiting the scope of a recount, the Canvassing Board voted 2 to 1 to begin  
26 *immediately recanvassing* the 573 previously rejected ballots. Based on the statements  
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1 made at the meeting, it appears that King County will immediately begin to determine  
2 again whether signatures for the 573 individuals exist and, if signatures are found, they  
3 will compare the signatures to determine whether they match the signature on the absentee  
4 ballot. Brady Dec., ¶ 10.

5 One member of the Canvassing Board seemed to suggest that if a signature was not  
6 found on file, the County should contact the remaining voters yet again and provide them  
7 with still another opportunity to provide a signature. It was unclear whether the County  
8 intends to do so. The County may also improperly decide that the absentee ballots that the  
9 County cannot match with signed registration forms or copies thereof may be counted  
10 anyway. Brady Dec., ¶ 11.

11 The majority of the Canvassing Board decided that if, during its recanvass,  
12 signatures are found and match the signatures on the ballots, the ballots will be removed  
13 from their security envelopes. As a practical matter, the removal of the ballots from the  
14 security envelopes makes it impossible to link the ballot to a particular voter later. If any  
15 of those ballots are later determined to be invalid or illegal, it will not be possible to  
16 retrieve those ballots from the sea of other counted ballots. It, therefore, could result in the  
17 entire election's being declared void if a contest proceeding later determines that certain  
18 classes of the ballots should not have been counted. Brady Dec., ¶ 12.

### 19 III. STATEMENT OF ISSUES

20 Should the Court enter a temporary restraining order enjoining defendants from  
21 recanvassing and counting any of the 573 previously canvassed and rejected absentee  
22 ballots? Should the Court enter a temporary restraining order preventing defendants from  
23 taking any actions that would place these ballots into a position where they could not be  
24 individually removed if it is later determined that some or all of the ballots are invalid or  
25 illegal and should not have been counted?

1 **IV. EVIDENCE RELIED UPON**

2 Plaintiffs rely upon the Declaration of Dan Brady in Support of Motion for  
3 Temporary Restraining Order, the Declaration of Kenneth Seal, the Declaration of Robert  
4 Maguire in Support of Motion for Temporary Restraining Order, and the papers and  
5 pleadings filed herein.

6 **V. ARGUMENT AND AUTHORITY**

7 **A. Introduction.**

8 We are in the latter stages of the second statewide recount in the election for  
9 Governor yet King County continues to produce newly found ballots and purported errors  
10 regarding its previous canvass. The Supreme Court has made clear, though, that the  
11 process of a recount is limited to a retabulation of the votes previously cast and tabulated  
12 and does not include a broad recanvass of previously rejected ballots. King County has  
13 improperly decided to recanvass 573 previously considered and rejected ballots without  
14 regard to the law and without fully investigating the facts – including issues of ballot  
15 security – surrounding these ballots. The court should enter an order preventing this.

16 At a bare minimum, the court should order that the County take no further steps  
17 regarding these ballots until the Canvassing Board is provided with a complete written  
18 explanation – available to the public – of the circumstances surrounding the discovery and  
19 treatment of these ballots from the appropriate elections officials and staff. There is good  
20 reason to develop a complete factual record before acting. Public confidence in the  
21 election process requires it.

22 The court should also ensure that whatever the ultimate disposition of these 573  
23 ballots, they should be preserved in such a way that if some categories of them are  
24 determined later to be invalid, they can be removed from the sea of ballots. King County  
25 is compounding its apparent previous error regarding these 573 ballots with another  
26 serious error that may make it impossible to later accurately determine the winner of the  
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1 Governor's race. This could result in the need for a new election. Because the election is  
2 so close, it is conceivable that these 573 ballots could become part of election contest  
3 proceedings. By deciding to separate these ballots from their security envelopes, King  
4 County is irresponsibly casting them irretrievably into the sea of ballots already tabulated.  
5 If the ballots are to be counted, they should be placed in their own sealed container and  
6 labeled separately from other tabulated ballots.

7 Furthermore, if there are distinctions between and among these ballots, they should  
8 be organized according to those distinctions. For example, ballots from voters who  
9 received letters from the County asking them to correct signature deficiencies should be  
10 kept separate from those who did not receive such letters. Because there are likely several  
11 ballots in each category, segregating the ballots will not undermine the secrecy of each  
12 ballot. Organizing the ballots by class will help reduce the risk that the entire election is  
13 declared void if a contest proceeding later determines that certain classes of the ballots  
14 should not have been counted but cannot be retrieved.

15 **B. The Standard for Temporary Restraining Order.**

16 The Washington standards for the issuance of a TRO and a preliminary injunction  
17 are as follows:

18 It is an established rule in this jurisdiction that one who seeks  
19 relief by temporary or permanent injunction must show (1)  
20 that he has a clear legal or equitable right, (2) that he has a  
21 well-grounded fear of immediate invasion of that right, and  
22 (3) that the acts complained of are either resulting in or will  
23 result in actual and substantial injury to him.

24 *Tyler Pipe Industries, Inc. v. Wash. St. Dept. of Revenue*, 96 Wn.2d 785, 792 (1982).

25 Furthermore, an injunction is appropriate when it will preserve evidence for further court  
26 review. *See, e.g., Shamley v. Olympia*, 47 Wn.2d 124, 126 (1955) (Court granted  
27 injunction pending a hearing on the merits of the case).

In other jurisdictions, courts have clearly recognized the need to preserve evidence  
regarding elections. In *Marks v. Stinson*, 1194 WL 47710 (E.D.Pa.), the Eastern District of



1 Pennsylvania addressed the standards necessary for a preliminary injunction in an election  
2 vote fraud case and found that the harm to the public warranted an injunction against  
3 certification of the election. The court noted in its finding of facts that removing absentee  
4 ballots from their envelopes makes it “difficult, if not impossible, to match a ballot with a  
5 particular voter.” *Id.* at \*3 (finding 25, 26). The court found in part that “[w]ith Regards  
6 to the Board [of Elections], it is their duty to ensure that elections are proper and fair. If an  
7 injunction is tailored to promote this end, the Board would not suffer any harm.” *Id.* at \*14.

8 **C. A Recount is not a Recanvass of Previously Considered and Rejected**  
9 **Ballots, and the 573 Ballots Should not be Recanvassed.**

10 Plaintiffs’ clear and equitable right to relief is manifest in Washington’s  
11 Constitution, election code, and the December 14, 2004 Supreme Court Opinion. If illegal  
12 ballots are counted, the votes of those who cast valid votes are diluted. The United States  
13 Supreme Court has recognized that the fundamental right to vote “can be denied by a  
14 debasement or dilution of the weight of a citizen's vote just as effectively as by wholly  
15 prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 535  
16 (1964). If King County proceeds to count illegal or invalid votes, the fundamental rights  
17 of those individuals casting valid votes, including plaintiffs Vance and Milhans, will be  
18 abridged. King County should not rush through a process that could lead to such a  
19 consequence.

20 Washington’s election code also makes clear that the current process of a recount  
21 does not include a recanvassing, but is merely a retabulation of the votes cast. The proper  
22 method for determining whether valid ballots were excluded or invalid ballots were  
23 counted is an election contest in which factual findings may be made and a record  
24 developed. As the Supreme Court held in its December 14 Opinion:

25 In this context, a “ballot” is a physical or electronic record of  
26 the choices of an individual voter, or the physical document  
27 on which the voter’s choices are to be recorded. RCW  
29A.04.008(1)(c),(d). “‘Recount’ means the process of  
retabulating ballots and producing amended election

1 returns....” RCW 29A.04.139 (emphasis added). The  
2 procedure for recounts is set forth in RCW 29A.64.041, and  
3 starts with the county canvassing board opening “the sealed  
4 containers containing the ballots to be recounted.” See RCW  
5 29A.60.110. Thus, under Washington’s statutory scheme,  
6 ballots are to be “retabulated” only if they have been  
7 previously counted or tallied, subject to the provisions of  
8 RCW 29A.60.210.

9 See Maguire Dec., Ex. 1; see also *State of Washington v. C.W. Clausen*, 72 Wn. 409, 410  
10 (1913) (“[A] careful examination convinces us that the decided weight of authority is to the  
11 effect that ballots improperly cast, or rejected because of illegality or unintelligibility,  
12 cannot be counted in determining total votes cast.”) *Id.* at 410.

13 Limiting a recount to a retabulation is not only required by Washington’s Supreme  
14 Court precedent, election statutes, and regulations, it is required by common sense. In a  
15 situation in which everyone knows how close the margin of victory was, to allow the King  
16 County Canvassing Board to reopen and presumably change some of its prior decisions  
17 about whether particular ballots are valid is to invite mischief.

18 **D. RCW 29A.60.210 Allows a Recanvass Only in Limited Circumstances**  
19 **that Do Not Apply Here.**

20 King County mistakenly contends that RCW 29A.60.210 provides them with  
21 blanket discretion to conduct a recanvass any time any error in the initial canvass is  
22 determined. Such a reading of the statute would defeat the legislature’s stated interest in  
23 achieving finality with elections and amounts to constantly moving the goal posts  
24 whenever they so choose. The statute, however, makes clear that the circumstances  
25 providing for a recanvass are limited and inapplicable here.

26 Under RCW 29A.60.210, a canvassing board may “recanvass” ballots if there is  
27 “an apparent discrepancy or an inconsistency in the *returns*,” but must conduct such  
activity on or before the last day to certify the election. (Emphasis added.) This election  
has already been certified. A recount, by contrast, of course takes place after the  
certification of the election and is governed by entirely different statutory provisions than

1 is a recanvass. RCW 29A.64 *et seq.* Furthermore, the discrepancies and inconsistencies  
2 that allow a recanvass are limited to those “in the returns” and are not so broad as to  
3 include revisiting previous discretionary decisions made by canvassing boards as to  
4 whether a signature on an absentee or provisional ballot matched the original voter  
5 registration signature or a blanket option for a canvassing board to revisit any alleged  
6 errors in the initial canvass. RCW 29A.64.210.

7 The word “returns” is referred to in a number of sections of Washington’s election  
8 code provisions. The references are unquestionably to the number of valid votes cast in the  
9 various races. As an example, RCW 29A.60.120(3) provides that “[t]he returns produced  
10 by the vote tallying systems, to which have been added the counts of questioned ballots,  
11 write-in votes, and absentee votes, constitute the official returns of the primary or election  
12 in that county.” These returns do not include rejected absentee or provisional ballots and  
13 the statutory provision is not a blanket authorization for a canvassing board to correct any  
14 and all errors in the initial canvass. The authorization is limited to where there is “an  
15 apparent discrepancy or an inconsistency in the *returns*.”

16 There is no possible manner in which apparent discrepancies or inconsistencies in  
17 these returns, the number of ballots cast and votes counted for specific candidates, provide  
18 a reason for the actions the King County Canvassing Board is taking—a review of  
19 absentee ballots previously considered and rejected. These are not part of the returns.  
20 Additionally, the Canvassing Board failed to make any showing of any discrepancy or  
21 inconsistency in the returns to justify a recanvass under this provision. Finally, even if the  
22 Canvassing Board does recanvass the ballots or voting devices in any precincts to address  
23 any numerical discrepancies, the statute does not authorize the Canvassing Board to re-  
24 view rejected ballot decisions.

25 Furthermore, the Supreme Court’s Opinion demonstrates that there are restrictions  
26 on the scope of any recanvass permitted under the statute. In *McDonald v. Reed*, (see  
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1 Opinion at Maguire Dec., Ex. 1), Petitioners asserted that counties had made errors in  
2 determining whether signatures on ballots matched signatures on original voter registration  
3 records. Petitioners presented numerous declarations identifying particular individuals  
4 who asserted that their ballots were improperly rejected based on those errors.  
5 Nevertheless, the Supreme Court refused to enter an order that would require a recanvass  
6 of those ballots. The situation at issue here is analogous. King County believes that it  
7 committed an error in matching signatures to registration records and wants to conduct a  
8 recanvass of those ballots as part of a recount. Under the Supreme Court's Order,  
9 however, they cannot do so.

10 **E. At a Minimum, the Ballots Should not be Recanvassed or Counted**  
11 **Until the Circumstances Surrounding Their Discovery and Treatment**  
**Have Been Investigated and Explained.**

12 In this case, the appearance of possible impropriety is troubling and needs to be  
13 investigated: After the Democratic King County Council Chair informed the Director of  
14 King County's elections that his ballot had been rejected, King County election officials  
15 removed 573 ballots from a secure location without observers present and without security.  
16 Then, the Canvassing Board decided that the ballots should be recanvassed immediately  
17 without a complete investigation of the circumstances surrounding these ballots. Prior to  
18 any further canvass or counting of these ballots, these circumstances should be investigated  
19 and explained to preserve or restore public confidence in King County's election process.

20 **F. Security Issues Cloud the Validity of These Ballots.**

21 Washington law is clear that ballots involved in a recount must be kept in secure  
22 and sealed containers, and these 573 ballots were not. What is more, these ballots were  
23 treated in an unusual manner that raises the appearance of impropriety that may be enough  
24 to later render the election void.

25 RCW 29A.64 governs "Recounts," and RCW 29A.64.041 specifically details the  
26 procedures for a recount. That section states, in no uncertain terms, that at the time set for  
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1 the recount, the authorities shall open the “sealed containers *containing the ballots to be*  
2 *recounted.*” (Emphasis added). Thus, the only ballots to be counted during the recount are  
3 those contained in those sealed containers. Correspondingly, RCW 29A.60.110 provides  
4 rules detailing how to seal these ballot containers. That provision clearly states that only  
5 counted ballots may be placed in the containers: “Immediately after their tabulation, *all*  
6 *ballots counted at a ballot counting center* must be sealed in containers that identify the  
7 primary or election.” (Emphasis added). The plain language of these rules does not allow  
8 for inclusion of any ballots previously rejected. The regulations therefore make clear that  
9 the only ballots that can be included in the sealed containers are those counted at some  
10 point at a balloting center, and only those ballots included in the sealed containers can be  
11 considered in a recount. As the Declarations of Dan Brady and Kenneth Seal demonstrate,  
12 the 573 ballots were not kept in sealed containers and were not always kept in a secure,  
13 locked room, and were moved to a different building without observers or law enforcement  
14 present.

15 Because of the security issues surrounding these ballots, it is quite likely that they  
16 will later be determined to be void even if there is not specific evidence of tampering. In  
17 addressing a case involving ballot security issues, the Illinois Supreme Court wrote:

18 These ballots were void. There is nothing in the record  
19 before us to indicate that any of them were actually tampered  
20 with by any unauthorized person, but it is entirely obvious  
21 that the opportunity to do so was present. It is the entire  
22 theory of our ballot law, as expressed in all of the cases, that  
23 once a ballot has been marked by a voter in secret, from that  
24 time on it shall not be subject to any opportunity for any  
other person to mar, change or erase it. It will be found in all  
of the cases that the question for consideration by the court is  
not whether the ballot has been tampered with, but whether  
or not an unauthorized person has had an opportunity to do  
so. If the opportunity has been present the presumption  
seems to follow that it has been used.

25 *Clark v. Quick*, 377 Ill. 424, 430 (Ill., 1941).<sup>2</sup>

26 \_\_\_\_\_  
27 <sup>2</sup> Numerous other courts have held that ballots cannot be counted or considered to override  
the returns submitted in the original canvas unless the ballots were preserved according to

1 The Washington Supreme Court has similarly affirmed an order voiding an election  
2 where ballot security was questionable.

3 [T]he fact that the keys to the padlocked sacks of ballots  
4 were accessible, [the trial court] concluded the election  
5 officers had been guilty of 'neglect of duty' under RCW  
6 29.04.030 in failing to properly safeguard the ballots from  
7 tampering. In his oral opinion, the trial judge observed  
8 we have the undisputed testimony in this case of the election  
9 officials that those ballots were most negligently  
10 subsequently handled. The evidence is, instead of being  
11 delivered immediately to the courthouse as the law requires,  
12 they were not, and of particular significance is the fact that  
13 the containers into which the ballots were stuffed after being  
14 counted were padlocked, but in each case the padlock had  
15 attached to it the key. A padlock with a key is no lock at all.  
16 Thus there was ample opportunity for fraudulent changes to  
17 be made, and there was, in terms of the statute, negligence  
18 on the part of the election officials that made that fraud  
19 possible.

20 Since the exact number of ballots which had been altered  
21 could not be ascertained, the court determined that the proper  
22 remedy for this neglect was the holding of a new election.

23 *Foulkes v. Hays*, 85 Wn.2d 629, 632 (1975).

24 Carefully crafted equitable relief provided now is necessary to reduce the  
25 possibility that the election is later declared void as a result of these ballot security issues.  
26 As explained below, at a minimum the court should require that the ballots not be further  
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proper procedures. "It has been held that before the ballots can be admitted in evidence in  
such a case and re-counted it must be shown that they have been safely kept by the proper  
custodian." Bonney v. Finch, 180 Ill. 133, 134 (Ill. 1899). See also Campbell v. Ramsey,  
150 Kan. 368, 376 (Kan. 1939) ("In order to continue the [cast] ballots controlling as  
evidence [rather than the canvassed results], it must appear that they have been preserved  
in the manner and by the officers prescribed in the statute, and that while in such custody  
they have not been so exposed to the reach of unauthorized persons as to afford a  
reasonable probability of their having been changed or tampered with.") (citations  
omitted); Frese v. Camferdam, 76 Ill. App. 3d 68, 73 (Ill. App. Ct. 1979) ("The sanctity of  
the voted ballot and the integrity of the entire election process demand that under these  
circumstances, where the opportunity for tampering was obviously present, the absentee  
ballots be declared invalid."); Gregory v. South Carolina Democratic Executive  
Committee, 271 S.C. 364, 375-376 (S.C. 1978) (Court upheld decision of election officials  
to not count votes that were discovered outside of proper ballot boxes).

1 canvassed or counted and not commingled with the sea of valid ballots until these security  
2 concerns can be investigated and addressed.

3 **G. These Ballots must be Kept Separate from the Sea of Tabulated Ballots.**

4 Without judicial intervention, these problematic absentee ballots will be  
5 unidentifiable in the future. The Court should order King County to keep these ballots  
6 separate, with their security envelopes and separated by class, until their validity has been  
7 finally determined. *See Pierce v. Allegheny County Bd. of Elections*, 324 F.Supp.2d 684  
8 (W.D.Pa., 2003). In *Pierce*, the court noted that if disputed ballots were commingled with  
9 other ballots such that they could no longer be specifically identified, an injunction was  
10 proper to preclude the commingling. *Id.*

11 If these disputed ballots are not kept separate from the sea of other tabulated ballots  
12 and must be kept with their security envelopes, a new election may be necessary. For  
13 example, in *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620 (Mass. 1982),  
14 seven absentee ballots that should not have been were commingled with the general vote  
15 pool. The ballots would have determined the outcome of the election. The Massachusetts  
16 Supreme Court declined to follow any arbitrary formula to guess at the makeup of the  
17 ballots and called for a new election. *See also Gooch v. Hendrix*, 851 P.2d 1321 (Cal.  
18 1993) (New election when illegal absentees that might have determined outcome of  
19 election were commingled and impossible to track); *Hardeman v. Thomas*, 208 Cal.App.3d  
20 153 (Cal. App. 1989) (New election when defective absentee ballots were commingled and  
21 impossible to track).

22 If, however, steps are taken now to ensure that these ballots are not separated from  
23 their envelopes, not commingled with the general vote pool, and kept separate as a class or  
24 in subclasses, the risk of needing a new election in the event some of the 573 are later  
25 determined to be invalid, is diminished. *See Pelagatti v. Bd. of Supervisors of Elections*  
26 *for Calvert Co.*, 682 A.2d 237 (Md. App. 1996) (No new election where it was unclear  
27

1 whether illegal/faulty ballots would have changed outcome). This Court clearly has the  
2 power to take steps to preserve the evidence regarding the 573 ballots. *McIntyre v.*  
3 *Morgan*, 624 F. Supp. 658, 660 (D. Ind., 1985) (Order prohibited election officials from  
4 destroying any evidence during a dispute of whether absentee ballots should be counted).  
5 The Eleventh Circuit has affirmed such an order:


6 While we await the Supreme Court's answer, to preserve the  
7 status quo with respect to the two elections at issue and, at  
8 the same time, allow the processing of the uncontested  
9 elections to proceed, we modify and clarify the district  
10 court's injunction as follows: (1) We affirm the portion of  
the district court's injunction requiring the defendants to  
preserve all election materials. We clarify this portion of the  
injunction by stressing that contested absentee ballots are not  
to be opened, altered, or tampered with in any manner.

11 *Roe v. State of Ala. By and Through Evans*, 43 F.3d 574 (11th Cir. 1995).

12  
13 DATED this 16<sup>th</sup> day of December, 2004.

14  
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